

O P I N I O N

The current parliamentary inquiry into a legal presumption of 50:50 joint parenting has generated intense interest. *Family Matters* is pleased to publish two views – from the Shared Parenting Council of Australia, and the Positive Shared Parenting Alliance. In many ways, these pieces act as a microcosm of the key issues in the current debate.

SHARED PARENTING COUNCIL OF AUSTRALIA . . .

Shared parenting *In the shadow of the law*



Geoffrey Greene

Law academics, judges, women's legal services, and single-mother groups have said much about the great wave of harm that could flow from implementing a rebuttable presumption of shared parenting in family law. Much of it has been alarmist, some extreme, but a great deal of misunderstanding of the proposed reform is evident in many claims.

Some of the arguments start off with the premise that shared parenting is "parent focused", not "child focused", and somehow fails to put a child's best interests first. However, the question that arises in this debate is: How can you act to protect the best interests of a child, if you don't uphold that child's fundamental human rights?

If you genuinely acknowledge and accept that every child has the right to experience the love, guidance and companionship of both their mother and father, you must support having societal structures defending those rights – especially in troublesome emotional times such as parental separation and divorce.

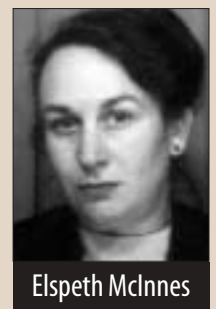
POSITIVE SHARED PARENTING ALLIANCE . . .

What's wrong with a presumption of joint custody?

A presumption of 50:50 joint custody of children would mean that, right at the point when parents decide they can no longer cooperate sufficiently to stay in a relationship, they would be required to begin the complex cooperative task of joint parenting across two households – a task which has often not been attempted even when the parents lived in the same household. The presumption is unrealistic, unnecessary and undermines children's best interests in favour of a rigid universal model of parents' rights.

Gender equality in the direct care of children has not featured as part of Australia's family culture. Australian Bureau of Statistics time use data confirm that Australian parents choose arrangements where mothers provide the majority of primary care for children. These arrangements tend to persist after separation. Only 3 per cent of children live in shared custody situations. Currently most parents organise their own post-separation parenting arrangements in the context of their own history of parenting in the relationship, their paid work commitments, their accommodation situation, their skills, capacities and interests, their availability for unpaid parenting work and their child's needs and interests.

The Family Law Act currently provides that parents share duties and responsibilities concerning the care, welfare and development of their children, but if parents can't agree on how this is to happen, Section 68F of the Act provides a range of relevant factors to guide decisions to prioritise the children's best interests.



Elspeth McInnes

By operating with a sole custody regime (meaning residence plus day-to-day responsibilities to one parent, in Family Law Reform Act terminology), there is inherently an infringement on the child's rights in every sole custody order made. While many may think they're acting "in the best interests of the child", they may in fact be abusing the child, by denying the child a full and meaningful relationship with one of his/her parents.

Many, including the Chief Justice of the Family Court, argue that because 95 per cent of applications in the Family Court do not proceed to defended hearing and final judicial determination, those 95 per cent of cases have made agreements that suit the parties concerned. Not likely. In the "shadow of the law" many of these agreements are forced and unfulfilling to at least one of the parents. Research by Parkinson and Smyth (2003) says that 74 per cent of fathers want more time with their children. Interestingly, 41 per cent of mothers want fathers to

have more time as well. Clearly these parents do not have agreements that they're satisfied with.

The fact that 95 per cent of family law matters are resolved without the need for a defended hearing in no way suggests that the Court is successful, or that parties are happy with their outcomes. The majority of these parties have had interim orders giving sole residence and day-to-day responsibility to one parent only. Parents are also told that they cannot get a shared parenting outcome at trial. Once again, agreements are made "in the shadow of the law".

Legal advice often falls along the lines: "If you want to maintain any day-to-day influence in your children's lives, then you need to litigate to the end. It's a win or lose process."

This is the practical experience of many parents in the Family Court. It has, in effect, a bias built into the system – a system that in effect says to participants: "If you cannot agree on a solution to your ➤



While children generally benefit from the close supportive involvement of their parents before and after separation, this does not mean that all children, under all circumstances, will be better off with equal time in the care of each parent. Joint physical custody has been found to be workable only in a minority of separations where parents have freely chosen the arrangement; in other circumstances, it has been associated with reduced cooperation and higher levels of conflict. The cases where joint custody has worked typically have no history of violence or conflict, both parents have wage incomes, live close to each other and are willing and able to adapt their work and their relationships to meet their parenting commitments.

Children have also to adapt to shuffling between households, complicating their access to education, health care, social contacts and possessions. Medical research has established that optimum infant mental and physical health and development is linked to breastfeeding, and stress-free stable attachments. Young children's developmental needs cannot easily be met if they are to be arbitrarily divided to satisfy each parent's entitlement.

In situations where parents can't agree or cooperate, joint custody can't work. Conflict between ex-spouses is associated with poor adjustment among children. Although continued contact with non-resident parents may be beneficial for children when their experience is positive, it can also increase conflict between parents, which is bad for children. The cases which come to the Family Court for orders are, by definition, high conflict cases, which often feature allegations of violence or abuse.

Joint custody is dangerous in separations involving violence or abuse. Almost 25 per cent of separated women say the primary reason their relationship failed was their partner's physical or emotional violence or substance abuse. Australian Bureau of Statistics data show that the time around and after separation is most dangerous for women and that threats, violence and abuse continue after separation. Australian homicide data show that a quarter of intimate partner homicides occur *after* separation, and that 84 per cent of these victims are women. Separation and family conflict is also the ➤

individual circumstance, a sole custody outcome will be ordered. One of you will win, one will lose." Parents are at risk of losing day-to-day care of their children for no other reason except that the other parent wants it that way.

The Parliament has repeatedly said that there is a shared parenting presumption in family law in Australia. The Parliament told us so in 1973–1974 and again in 1995 (and numerous times in between). Consider how Senator Lionel Murphy viewed his own reforms on 28 March 1973: "When a family is broken up, when there is a divorce, at least let us enable those people involved to solve their differences in a decent human and dignified way, and without their being subjected to this kind of expense."

In relation to a presumption of shared parenting, Senator Missen had this to say on 29 October 1974: "It would create the concept of Joint Custody under the law."

Twenty years later, during the debate for the 1995 Family Law Reform Bill, the Hon. Peter Duncan MP, Parliamentary Secretary with responsibility for carriage of this Bill, said in his second reading speech: "The original intention of the late Senator Murphy was that the Family Law Act would create a rebuttable presumption of shared parenting, but over the years the Family Court has chosen to largely ignore that. It

is hoped that these reforms will now call for much closer attention to this presumption and that the Family Court will give full and proper effect to the intention of the parliament."

For almost 30 years, the people of Australia have been led to believe that this country's system of administration and management of families experiencing separation and breakdown is fair, just, equitable, low cost and dignified. The Parliament has told the people that it would be based on a shared parenting presumption, and that these would be the expected outcomes from the Family Court.

Clearly, none of this has occurred, and now the issue has reached significant critical mass that the general community has demanded a reality check by the federal Parliament. This is not a legal problem. This is a political problem burning away in electorate offices of Federal MPs across the country. How Australia best deals with the care and nurturing of children after a family separation requires realignment and a new focus on the child's rights. As the Prime Minister said (Hansard 24 June 2003), this is "appropriately the concern of the national parliament".

Introducing a rebuttable presumption of shared parenting will displace the long, dark shadow currently hanging over the heads of every family experiencing breakdown or separation. It will re-establish the will of Parliament upon recalcitrant agencies and courts,

single most common context for child homicide in Australia, accounting for one third of all child killings. Fathers were usually the perpetrators in these contexts.

Numerous Australian studies have identified serious continuing flaws in child protection processes in the Australian family law system, which result in orders that force mothers to send children to contact with men who use violence. Under the 50:50 presumption, parents and children fleeing violence would remain exposed to abuse unless and until they could gain a court order to protect them.

Fathers who model positive ways of being male are beneficial for boys and girls, but there is no evidence of a simplistic cause-and-effect relationship between father presence or absence and child wellbeing. As in all human relationships, it is the quality of the interaction that makes the difference. A father who models aggressive and controlling behaviours towards family members and others is traumatising his children, not helping them.

Claims about "fatherlessness" tend to confuse a range of social adversities with family structure. Australian children living in sole-parent households mostly do well, with small differences, and large overlap, in most measures of wellbeing, compared to children in two-parent households. Children living with both parents typically have better outcomes because children of parents who divorce are more likely to have lived with poverty, substance abuse, physical and emotional abuse, and high levels of parental conflict both before and

after separation. Family abuse, addictions and poverty have a continuing adverse impact on children's wellbeing, whatever the post-separation arrangements.

The 50:50 presumption also presents serious financial risks for children of separated parents. Children living across two households cost more overall to support, but family payments and child support are proportionately distributed. Joint 50:50 custody means that child support and family payments will be split across households regardless of the actual division of care and costs. A parent receiving benefits and child support calculated on the 50:50 presumption could receive financial benefits without in fact providing care and without meeting half the child's costs. The parent providing the extra unfunded care and costs would need to "prove" their case in court, involving stress, expense and delay to receive a correct level of financial support. Parents whose ex-partners used violence or abuse would face additional risks of coercion.

According to Australian Institute of Family Studies research, mothers are already more likely than fathers to experience persistent financial hardship after divorce. Mothers who sacrificed career and education opportunities during the marriage to stay at home as primary parents to their children tend to have lower earning skills and capacities after separation. American research into joint custody shows that mothers still end up doing most of the core work of parenting, but with less financial support. A number of studies show that in dual

and provide more certainty of outcomes for separated parents and their children.

Parents will be educated to understand their responsibilities to share the care and upbringing of their children. Parents will be expected to cooperate and will be free to do so within a new framework premised on agreement, sharing and conciliation, ultimately resulting in less litigation and cost.

The Shared Parenting Council of Australia argues that a rebuttable presumption of shared parenting after separation or divorce will provide all the necessary protection for a child at risk, while simultaneously providing an improved framework for separating parents.

Where implemented, shared parenting arrangements will offer the least disruption to the child's relationships and familial bonds caused by the separation of his/her parents. That will help provide an improved social environment for children and their families, allowing them greater opportunity to recover from the harmful effects of divorce.

Geoffrey Greene is the Federal Director of the *Shared Parenting Council of Australia*. Established in 2002, the Council is a representative body of 28 affiliated organisations that support the aims and objectives to have enshrined in law every child's fundamental human right to experience an equal relationship and opportunity with both their mother and father following parental separation or divorce. A fully referenced version of this position paper may be obtained by contacting the SPCA on (08) 8261 5191, or by email: info@spca.org.au

custody cases, fathers' actual custody of children tends to decrease over time, whereas mothers' remains stable, or increases.

Litigation is also likely to increase as parents who do not want 50:50 shared residence are forced to go to court, and parties re-open finalised cases in the belief that the change will bring them a different result. Legal aid restrictions mean that many parents will be forced to self-represent, increasing delays and costs even further. Children and families who had achieved some stability may again be forced into litigation to protect their established living arrangements.

Other practical difficulties in imposing 50:50 custody include access to suitable housing and child care places, relocation and re-partnering. Family needs change over time and post-separation parenting arrangements need to be able to adapt to those needs.

The Positive Shared Parenting Alliance argues that the best interests of children can only be paramount when each child is entitled to unique consideration of its interests and circumstances, rather than any presumed model of division between parents. Any change to a parenting formula will reduce children's rights and best interests, and should be opposed.

Elsbeth McInnes and co-authors, **Gerry Orkin**, **Kathleen Swinbourne** and **Michael Flood**, are coordinating members of the *Positive Shared Parenting Alliance*. Established in 2003, the Alliance of organisations and individuals opposes a rebuttable presumption of joint custody, and provides links, literature and evidence-based resources to counter fallacies and myths about joint custody. A fully referenced version of this position paper may be obtained by contacting the Alliance via email: admin@positivesharedparenting.org



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